

Wills, Probate, Estates & Dispute Resolution

By Russell Evans, CEO & Mediator at Resolve UK¹

Claims in relation to the estate of a mother, father, brother, sister, spouse or partner are often highly emotive. There is often a sense of injustice, suspicion and mistrust. Sometimes there are deep divisions, historic rivalries and even jealousies with multiple competing family members and even multiple competing families.

We no longer live in a world of the nuclear family where all members of the family live under the same roof or in the same locality. Families are frequently dispersed. We now live in a world of multiple partners, high divorce rates and unmarried couples. Indeed there may be multiple families and offspring.

Estates are no longer small. Rather than a world characterised by predominantly tenanted residence we now live in a world of property ownership at a time which has witnessed surging property prices which have pushed up the value of even a modest terraced house. Bequests are no longer trinkets and mementos. Often there is an estate of some size. Indeed there may seem a pot of gold worth fighting over.

One family member may have been favoured. Some family members may feel let down or left out. Others may feel that they have shouldered the burden. Indeed because of our fragmented society the burden of caring for an elderly parent may frequently fall on one family member alone.

It is within this historic emotionally charged landscape that disputes arise. There may be a feeling of injustice because of the terms of a will or because of significant lifetime gifts. Maybe promises have been made! Often there is unfulfilled expectation.

Typical wills, probate and estate claims include:

- Claims for financial dependency under the Inheritance Act
- Claims challenging the will by virtue of undue influence
- Claims challenging the will by reason of incapacity or lack of knowledge
- Claims for an extra share of the estate by reason of proprietary estoppel
- Claims for an extra share of the estate by reason of constructive trusts
- Claims arising out of inactivity and non distribution of the estate

The basic requirements for a will are set out under the Wills Act 1837 including it's written form, need for signature and attestation. In addition the testator must understand the nature and affect of the will. As Lord Cockburn said in *Banks v Goodfellow* (1870) LR 5 QB 565 :

'It is essential ... that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane

delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.'

Claims attacking the validity of a will including claims based on undue influence or lack of testamentary capacity and understanding can lead to the revocation of a will, a prior will taking precedence or even intestacy. The recent case of *Hawes v Burgess* (2013) EWCA Civ 74 concerned a testator with dementia and the case of *Hubbard v Martin* (2011) EWHC 2750 an estate passing to someone described as a cleaner.

Undue influence requires some form of coercion. What amounts to actual undue influence is a question of fact. As Sir James Hannon said in *Wingrove v Wingrove* (1885) LR 11 PD 81:

'The coercion may, of course, be of different kinds, it may be in the grossest forms such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain that the sick person may be induced, for quietness sake, to do anything. This would equally be coercion though not actual violence.'

As Viscount Haldane also said in *Craig v Lamoureux* (1920) AC 349:

'Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgement ... will constitute undue influence.'

Claims under the Inheritance Act are frequently brought by wives, partners, disappointed children and others who have been maintained by the deceased.ⁱⁱ In order to bring a claim under the Inheritance Act the testator must at the time of death have been domiciled in England and Wales. A claimant must fall within one of several defined categories including spouses and children. A claimant must then demonstrate that no reasonable financial provision has been made for him or her. If so a court will then decide what if any provision should be made. There is a marked difference in approach between claims by spouses and those of adult children.

Claims for an additional asset share by way of constructive trust or proprietary estoppel are usually based on representations, expectation and conduct. Constructive trusts can arise in circumstances where there are direct contributions towards the purchase price of property including mortgage instalments. Proprietary estoppel requires a representation by the testator and detrimental reliance as a consequence of that representation by the claimant.

Recent cases have included *Thorner v. Majors* (2009) 1 WLR 776 where a farmer promised a young relative that in exchange for working on his land for little or no pay he would inherit the farm in his will. Other successful cases have included claims based on promises where the claimant has moved in with the testator, paid for and effected improvements to property and provided long term care. The case of *Bradbury v Taylor* (2012) EWCA Civ 1208 even concerned a claim made during both parties lifetime when a testator changed his will contrary to previous promises which had

been relied upon. As always actual circumstances and proof are essential. When dealing with proprietary estoppel claims the courts will do no more than is necessary to do equity between the parties.

Contentious probate cases in their multitude of forms are embedded with highly personal, highly emotive disputes. Court cases by their very nature tend to reinforce the conflict focusing as they do on the central dispute fuelling the flames of anger, hurt and frustration. Mediation by contrast focuses on dispute resolution and reconciliation.

Mediation can tread its way through the historic anger, resentment and mistrust and facilitate a dialogue, a reflective review and a calm reasoned discussion in a confidential setting which usually leads to a framework for resolution.

Court cases are littered with emotional turmoil, high costs and trauma. As Mr Justice Briggs observed in the case of *Lilleyman v Lilleyman* (2012) EWHC 1056 which concerned a wife's claim against her late husband's estate:

'While it may be that a 'no holds barred' approach to certain types of litigation is entirely appropriate, it is not in my judgment at all appropriate in the context of claims under the Inheritance Act.'

In failing to negotiate and compromise Mr Justice Briggs noted that *'Mrs Lilleyman was ...engaged in a high risk venture in which she played for high stakes and, in substance, lost.'* Cost consequences of course followed.

The Judge can, as in *Lilleyman*, order that the costs are substantially paid by one party. The judge can also however order that the costs are paid out of the Estate thereby penalising all parties. The significant costs of litigation can even on occasion consume the entire value of the Estate.

Many judges believe that parties should engage in constructive discussions and seek to resolve their dispute by way of mediation. Indeed this is what Lord Justice Ward said in the Court of Appeal case of *Oliver v Symons* (2012) EWCA Civ 267:

Parties should 'put their faith in the hands of an experienced mediator, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come'

If you are engaged in conflict Mediation could be right for you.

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i Russell Evans is a practicing Mediator, Arbitrator and Legal Consultant. He is practice manager at Resolve UK a nationally accredited mediation panel approved by the Ministry of Justice. He is a former solicitor and former Head of Litigation & Dispute Resolution and an expert in contentious probates cases. For further details or to explore the use of mediation see www.resolveukmediation.co.uk or contact Russell at resolve@resolveuk.co.uk

ii There are relatively short time limits for dependency claims under the Inheritance Act.